A

SUKATNO

v.

LEE SENG KEE & ANOR

B

COURT OF APPEAL, PUTRAJAYA
JAMES FOONG JCA
ABDUL MALIK ISHAK JCA
ABU SAMAH NORDIN JCA
[CIVIL APPEAL NO: A-04-76-2008]

C

2 JANUARY 2009

ROAD TRAFFIC: *Negligence - Pedestrian struck by motor van - Whether plaintiff pedestrian was walking on the side of the road or was stationary at the centre white line or was crossing the road when collided*

D

into by defendant - Whether High Court judge failed to consider evidence in totality

TORT: *Negligence - Duty of care - Road accident - Duty of care of motorist to other road users*

E

TORT: *Damages - Road accident - Loss of earnings - Whether plaintiff pedestrian an illegal immigrant - Whether plaintiff entitled to claim for loss of earnings*

TORT: *Road accident - Contributory negligence - Assessment of - Equal*

F

apportionment of liability - Principles applicable - Whether sessions court judge's finding of 50:50 liability should be set aside

The plaintiff, a pedestrian, was paralysed from the waist down as a result of a road accident. The plaintiff brought an action against

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the defendant, the driver of a motor van who it was alleged had driven the said motor van and had collided into the plaintiff. The defendant in turn brought an action against a third party claiming, *inter alia* that, that it was the third party, the driver of a motor car that had collided into the plaintiff causing him the said injuries. The sessions court found the defendant 50% liable for negligence

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and the plaintiff 50% liable for contributory negligence. The plaintiff was awarded RM150,000 as general damages and under the category of special damages, *inter alia*, RM153,600 for loss of future earnings. Dissatisfied with this decision the defendant

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appealed to the High Court. The High Court allowed the defendant's appeal. This was the plaintiff's appeal against the decision of the High Court. In this appeal, the focus was on the

question of liability of the parties and the entitlement of the plaintiff, an Indonesian working in Malaysia to a claim for loss of earnings as he was alleged to be an illegal immigrant at the material time.

Held (allowing the plaintiff's appeal)
Per Abdul Malik Ishak JCA delivering the judgment of the court:

(1) The defendant owed a duty of care to the plaintiff so as not to collide into the plaintiff pedestrian who was then walking on the right side of the road. The plaintiff as a pedestrian had the right to be on the road and he was entitled to expect that the defendant as the driver of the motor van to exercise reasonable care while driving along the road. However the plaintiff too must take reasonable care of himself while walking on the same road. There was no cause to interfere with the finding of the sessions court that the plaintiff had contributed to his own injury on the basis of 50% liability and therefore had contributed 50% to his own injury. (paras 48 & 55)

(2) On the evidence before the court, the plaintiff was entitled to rely on the doctrine of *res ipsa loquitur* to prove his case against the defendant. The inference of negligence on the part of the defendant was clear. (paras 57 & 58)

(3) Had the High Court judge asked the correct question and viewed the evidence in its totality instead of compartmentalising them, he would have apportioned liability in equal proportion between the plaintiff and the defendant like what the sessions court did. (para 73)

(4) On the evidence, the sessions judge and the High Court judge were correct to have absolved the third party from blame as there was no evidence to show that the third party did collide into the plaintiff. (para 76)

(5) There was no justification to interfere with the findings of liability of equal proportion between the plaintiff and the defendant by the sessions judge. The defendant was negligent in driving the motor van in the manner in which he did and the plaintiff too had contributed by his own want of care for the injuries sustained by him. (para 85)

(6) The evidence showed that at the material time of the accident that the plaintiff was a legal immigrant worker. There was no concrete proof that the plaintiff was an illegal worker. Neither was there any evidence that the plaintiff played a role in contravening the laws of this country. The High Court judge failed to assess the evidence judiciously and he arrived at the wrong conclusion when he set aside the award under this head. It followed that the award for loss of earnings should be re-instated. (paras 94, 95, 96 & 100)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif, seorang pejalan kaki, lumpuh dari bahagian pinggang ke bawah akibat kemalangan jalanraya. Dia membawa tindakan terhadap defendan, pemandu motorvan yang didakwa telah memandu motorvan tersebut dan melanggar plaintif. Defendan sebaliknya membawa tindakan terhadap pihak ketiga mendakwa, *inter alia*, bahawa pihak ketiga iaitu seorang pemandu motor kereta telah melanggar plaintif menyebabkan kecederaannya. Mahkamah Sesyen mendapati liabiliti defendan 50% untuk kecuaian dan liabiliti plaintiff 50% untuk kecuaian sertaan. Mahkamah Sesyen mengawardkan plaintif RM150,000 sebagai ganti rugi am dan di bawah ganti rugi khas, *inter alia*, RM153,600 bagi kehilangan mata pencarian masa hadapan. Defendan tidak puas hati dengan award tersebut dan merayu ke Mahkamah Tinggi yang membenarkannya. Maka rayuan plaintif ini terhadap keputusan Mahkamah Tinggi. Dalam rayuan ini, fokus ditumpukan kepada persoalan liabiliti pihak-pihak berkenaan dan hak plaintif menuntut kehilangan pendapatan memandangkan dia merupakan seorang pekerja warga Indonesia yang bekerja di Malaysia pada masa material. Defendan mendakwa plaintif tidak berhak menuntut kehilangan pendapatan atas sebab pendapatan tersebut haram kerana plaintif seorang imigran yang tidak sah.

Diputuskan (membenarkan rayuan plaintif)
Oleh Abdul Malik Ishak HMR menyampaikan penghakiman mahkamah:

(1) Defendan berkewajipan berjaga-jaga kepada plaintiff supaya tidak melanggar plaintif pejalan kaki yang berjalan di atas jalan di sebelah yang betul. Plaintif berhak berada di atas jalan tersebut dan berhak berharap bahawa defendan sebagai pemandu motorvan akan mengambil sikap jaga-jaga yang

munasabah semasa memandu. Namun, plaintif juga mesti mengambil sikap jaga-jaga yang munasabah semasa berjalan. Tiada sebab untuk bercampur tangan dengan dapatan Mahkamah Sesyen bahawa plaintif menyumbang kepada kecederaannya dan dengan itu mengakibatkan 50% kecederaannya.

(2) Berdasarkan keterangan di hadapan mahkamah, plaintif berhak bergantung kepada doktrin *res ipsa loquitur* untuk membuktikan kesnya terhadap defendan. Inferens kecuaiannya jelas.

(3) Jika Hakim Mahkamah Tinggi membuat persoalan betul dan mengambil keterangan secara keseluruhannya daripada membahagikannya, yang arif hakim akan mengagihkan liabiliti yang sama di antara plaintif dengan defendan sepertimana yang dibuat Mahkamah Sesyen.

(4) Hakim Sesyen dan Hakim Mahkamah Tinggi betul membebaskan pihak ketiga kerana tiada keterangan yang dikemukakan untuk menunjukkan bahawa pihak ketiga berlanggar plaintif.

(5) Tiada justifikasi untuk mengganggu dapatan Mahkamah Sesyen berkenaan pengagihan liabiliti yang sama di antara plaintif dengan defendan. Defendan cuai memandu motorvan dengan cara yang dipandunya dan plaintif juga menyumbang dengan tidak berjaga-jaga menyebabkan kecederaannya.

(6) Keterangan menunjukkan bahawa pada masa material plaintif merupakan seorang imigran sah. Tiada bukti bahawa plaintif seorang pekerja yang tidak sah. Begitu juga tiada keterangan plaintif melanggari undang-undang negeri ini. Mahkamah Tinggi gagal menilaikan keterangan secara kehakiman dan sampai kepada kesimpulan yang salah apabila mengenepikan award kehilangan pendapatan. Ianya mengikut bahawa award tersebut mesti dikembalikan semula.

Case(s) referred to:

Abdul Ghaffar Md Amin v. Ibrahim Yusoff & Anor [2008] 5 CLJ 1 FC ***(refd)***

AC Billings & Sons Ltd v. Riden [1958] AC 240 ***(refd)***

Boss v. Litton [1832] English Reports 172 ***(refd)***

Bottomley And Another v. Bannister And Another [1932] 1 KB 458 ***(refd)***

Boy Andrew (Owners) v. St Rognvald (Owners) [1948] AC 140 ***(refd)***

Bruce v. Odhams Press, Limited [1936] 1 KB 697 ***(refd)***

Caswell v. Powell Duffryn Associated Collieries, Limited [1940] AC 152 ***(refd)***

Carmarthenshire County Council v. Lewis [1955] AC 549 ***(refd)***

A *Craig v. Glasgow Corporation [1919] 35 The Times Law Reports 214* ***(refd)***
Davie v. New Merton Board Mills Ltd [1956] 1 WLR 233 ***(refd)***
Fardon v. Harcourt-Rivington [1932] All ER Rep 81 ***(refd)***
Froom And Others v. Butcher [1976] 1 QB 286 ***(refd)***
Gaffney v. The Dublin United Tramways Co, Ltd [1916] Vol II Irish Reports 472 ***(refd)***
B *Gee v. The Metropolitan Railway Company [1872-3] LR Vol VIII QB 161* ***(refd)***
Glasgow Corporation v. Muir And Others [1943] AC 448 ***(refd)***
Goh Ya Tian v. Tan Song Gou & Ors [1981] 1 LNS 39 ***(refd)***
Grant v. Australian Knitting Mills Limited, And Others [1936] AC 85 ***(refd)***
C *In re An Arbitration Between Polemis And Another And Furness, Withy And Company, Limited [1921] 3 KB 560* ***(refd)***
Jenkins v. Holt [1999] Times LR 416 ***(refd)***
Kayser v. London Passenger Transport Board [1950] 1 All ER 231 ***(refd)***
Knowles v. Roberts [1888] 38 Ch D 263 ***(refd)***
D *Laurie v. Raglan Building Co Ltd [1941] 3 All ER 332* ***(refd)***
Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 ***(refd)***
Le Lievre And Dennes v. Gould [1893] 1 QB 491 ***(refd)***
Lloyde v. West Midlands Gas Board [1971] 1 WLR 749 ***(refd)***
Lochgelly Iron And Coal Company, Limited v. M'Mullan [1934] AC 1 ***(refd)***
E *M'Alister (Or Donoghue) (Pauper) v. Stevenson [1932] AC 562* ***(refd)***
MA Clyde v. Wong Ah Mei & Anor [1970] 1 LNS 73 ***(refd)***
Mahon v. Osborne [1939] 2 KB 14 ***(refd)***
McGowan v. Stott [1930] Vol 99 Law Journal Reports, King's Bench 357 ***(refd)***
F *Nance v. British Columbia Electric Railway Company LD [1951] AC 601* ***(refd)***
O'Connell v. Jackson [1972] 1 QB 270 ***(refd)***
Ooi Han Sun & Anor v. Bee Hua Meng [1991] 3 MLJ 219 ***(refd)***
Overseas Tankship (UK) Ltd v. Morts Docks & Engineering Co Ltd (The Wagon Mound) [1961] AC 388 ***(refd)***
G *Parry v. Aluminium Corporation, Ltd [1940] Vol 162-3 The Law Times 236* ***(refd)***
Philipps v. Philipps And Others [1878-79] 4 QBD 127 ***(refd)***
Rassam v. Budge [1893] 1 QB 571 ***(refd)***
Rawding v. London Brick Co Ltd [1971] 10 KIR 207 ***(refd)***
H *Simirah v. Chua Hock Lee & Anor [1963] 1 LNS 128 HC* ***(refd)***
Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 CA ***(refd)***
Tay Lye Seng & Anor v. Nazori Teh & Anor [1998] 3 CLJ 466 CA ***(refd)***
Turner v. Mansfield Corpn [1975] Vol 119 Part 2 Sol Jo 629 ***(refd)***
Waghorn v. George Wimpey & Co Ltd [1969] 1 WLR 1764 ***(refd)***
Wakil Diri Bagi Harta Pusaka Atas Rosli Md Nor (Simati) & Ors v. TP
I *Saffeer & Anor [1998] 4 CLJ 241* ***(refd)***

Widdowson v. Newgate Meat Corporation and Others [1997] Times LR 622 ***(refd)***
Yahaya Mat & Anor v. Abdul Rahman Abu [1982] CLJ 68; [1982] CLJ (Rep) 363 FC ***(refd)***

Legislation referred to:
Highway Code, rr. 28, 56, 59, 60
Road Traffic Ordinance 1958, s. 59(4)

Coal Mines Act 1911 [UK], s. 55

For the plaintiff - Brijnandan Singh Bhar (Shailender Bhar & IS Sandhu with him); M/s Sandhu & Assoc
For the defendant - Jagjit Singh (Mr Vivekandan with him); M/s Jagjit Singh & Co
For the 3rd party - Raam Kumar (Tan Khay Tsoon with him); M/s KB Tan, Kumar & Partners

[Appeal from High Court, Ipoh; Civil Appeal No: 12-186-2001]

Reported by Peter W L Chan

JUDGMENT

Abdul Malik Ishak JCA

The Parties

[1] I shall refer the parties to what they were referred to before the Sessions Court at Ipoh, Perak. Thus, Sukatno will be referred to as the plaintiff. While Lee Seng Kee will be referred to as the defendant and, finally, Ong Thean Soo will be referred to as the third party.

At The Sessions Court

[2] In the statement of claim, the plaintiff alleged that the plaintiff had suffered personal injuries and loss arising out of a road accident which occurred on 30 June 1996 at about 3.10pm along Jalan Fair Park, Ipoh, Perak involving a motor van WR 5906 allegedly driven negligently by the defendant and while so driven collided into the plaintiff who was walking on the same side of the road.

[3] The Sessions Court on 28 November 2001 found the defendant 50% liable to the plaintiff in the tort of negligence and also found the plaintiff 50% liable for contributory negligence. However, the Sessions Court dismissed the defendant's claim against the third party with costs.

[4] On the basis of 100% liability, the Sessions Court awarded the plaintiff the sum of RM150,000 as general damages bearing in mind that the plaintiff was paralysed from the waist downwards as a result of the road accident. That would be for pain and suffering and the award carried with it interest at the rate of 8% per annum from the date of service of the summons on 21 October 1996 till the date of judgment on 28 November 2001.

[5] For special damages, the Sessions Court awarded RM14,000 for transport expenses with an interest of 4% per annum from the date of the accident on 30 June 1996 until the date of judgment on 28 November 2001.

[6] Still under the category of special damages, the Sessions Court awarded the following awards:

(i) a sum of RM580 as cost of relevant documents with interest at 4% per annum from the date of the accident on 30 June 1996 until the date of judgment on 28 November 2001;

(ii) a sum of RM310 being cost of medical treatment with 4% interest per annum from the date of the accident on 30 June 1996 until the date of judgment on 28 November 2001;

(iii) a sum of RM21,600 towards the cost of pampers with interest at 4% per annum from the date of the accident on 30 June 1996 until the date of judgment on 28 November 2001;

(iv) a sum of RM153,600 for loss of future earnings calculated at RM800 per month for 16 years;

(v) a sum of RM60,000 for nursing care; and

(vi) costs of the action at RM18,036.

At The High Court

[7] The defendant appealed to the High Court against the whole of the decision of the Sessions Court.

[8] In regard to the loss of future earnings in the sum of RM153,600 that was awarded to the plaintiff by the Sessions Court, the defendant appealed to set it aside on the grounds that it was gained through illegal earnings confounded by the fact that the plaintiff was an illegal immigrant.

[9] Before the High Court, the appeal by the defendant was focussed on liability and the loss of future earnings.

[10] After hearing arguments, the High Court allowed the defendant's appeal against liability and set aside the finding of 50% liability against the defendant and the 50% contributory negligence against the plaintiff. The High Court also held that the plaintiff's claim against the defendant should be dismissed with costs. In regard to the award for loss of future earnings at RM153,600, the High Court set it aside. However, the dismissal of the defendant's claim against the third party was affirmed by the High Court with no costs awarded to the third party.

[11] In short, the High Court allowed the defendant's appeal with costs.

The Appeal

[12] Aggrieved by the decision of the High Court, the plaintiff filed an appeal against the whole decision of the High Court to this court.

Analysis

(a) Liability

[13] In his police report at p. 26 of the additional appeal record ("AAR"), the plaintiff said that on 30 June 1996 at about 2.50pm while he was walking along Jalan Fair Park near to the Magnum shop on the left side of the road, a motor van WR 5906 suddenly collided into him and he lost consciousness. The plaintiff also said in his police report that he was warded at the Ipoh General Hospital and that he sustained injuries to his back.

[14] The plaintiff lodged his police report on 10 July 1996 at about 11.40pm some ten (10) days after the defendant lodged his police report on 30 June 1996 at about 4.35pm as reflected at p. 30 of "AAR".

[15] It was quite natural for the plaintiff to lodge his police report some ten (10) days later because he was rendered unconscious after the collision and landed himself at the Ipoh General Hospital.

[16] In his statement of claim at pp. 237 to 239 of the appeal record bundle 3 ("ARB3"), the plaintiff averred that on 30 June 1996 at about 3.10pm when he was walking along Jalan Fair Park he was collided into by motor van WR 5906 driven by the defendant which was travelling from Ipoh town in the direction of Kampung Simee.

[17] The plaintiff averred in his statement of claim that the accident occurred due to the negligence of the defendant or alternatively due to the contributory negligence of the defendant.

[18] The particulars of negligence of the defendant advanced by the plaintiff in his statement of claim were, *inter alia*:

(i) driving too fast;

(ii) driving too close to the edge of the road;

(iii) driving in the wrong direction;

(iv) failed to provide any reasonable warning as to his arrival;

(v) failed to apply the brakes within reasonable time or not at all or failed to drive slowly or control the motor van WR 5906 in order to avoid colliding into the plaintiff;

(vi) failed to observe the plaintiff within reasonable time in order to avoid the road accident;

(vii) entered into the plaintiff's path;

(viii) failed to wait until the plaintiff had safely walked away; and

(viv) failed to observe the provisions of the Highway Code.

[19] In his statement of claim, the plaintiff also relied on the doctrine of *res ipsa loquitur*.

[20] In his statement of defence, the defendant denied the averments made by the plaintiff in the plaintiff's statement of claim in regard to the particulars of negligence of the defendant and put the plaintiff to strict proof thereof.

[21] The defendant, in his statement of defence, denied each and every allegation of negligence itemised by the plaintiff in the plaintiff's particulars of negligence of the defendant and put the plaintiff to strict proof thereof.

[22] The defendant, in his statement of defence, put the whole blame for the road accident onto the plaintiff or alternatively alleged contributory negligence on the part of the plaintiff.

[23] The particulars of negligence of the plaintiff itemised by the defendant in his statement of defence included, *inter alia*:

(i) failed to observe the presence of the motor van WR 5906;

(ii) walking hurriedly;

(iii) failed to give any warning as to his presence;

(iv) failed to consider the presence of other road users;

(v) failed to give adequate and ample leeway to motor van WR 5906;

(vi) failed to take care of himself when he was on the road; and

(vii) created a dangerous situation which posed difficulty to the defendant to avoid the accident.

[24] In his statement of defence, the defendant denied that the doctrine of *res ipsa loquitur* applied in this case.

[25] Now, the particulars of negligence of the plaintiff as advanced by the defendant in his statement of defence as set out at paras "n" to "r" of p 245 of "ARB3" were not supportive of the defendant's case against the plaintiff. Paragraph "n" of the particulars of negligence of the plaintiff averred that the plaintiff was driving a vehicle and that the plaintiff overtook vehicles ahead of him and encroached into the defendant's side of the road. This cannot be right because the plaintiff was a pedestrian and was not driving a vehicle.

[26] The suggestion that the plaintiff was crossing the road at the material time fell flat to the ground if we were to take a look at the statement of claim of the defendant against the third party as seen at pp. 247 to 249 of "ARB3". The defendant's statement of

claim against the third party supported the plaintiff's version that the plaintiff was walking by the side of the road when he was collided into by motor van WR 5906.

[27] In the defendant's statement of claim against the third party, the defendant did not aver that the plaintiff was crossing the road. It is correct to say that the case of the plaintiff that the plaintiff was walking by the side of the road was confirmed by the defendant in his statement of defence to the plaintiff's claim as well in the defendant's statement of claim against the third party.

[28] The third party filed a defence to the defendant's statement of claim and the third party's defence can be seen at pp. 250 to 253 of "ARB3". In itemising the particulars of negligence of the defendant, the third party did not allege that the plaintiff was crossing the road.

[29] Even the defendant's police report at p. 30 of "AAR" did not say that the plaintiff was crossing the road. The defendant did not say in his police report that a third party vehicle collided into the plaintiff who was crossing the road. All the defendant said was this, "apabila sampai depan Magnum tiba-tiba sebuah motokar no: ACN 3772 yang datang dari arah stadium telah terlanggar pejalan kaki."

[30] And when the defendant suggested that the third party had collided into the plaintiff and that caused the plaintiff to be flung to the defendant's side of the road, the defendant did not say that the plaintiff was crossing the road. If the High Court judge had not misread all the pleadings of the parties, he would have noted that the defendant did not allege that the plaintiff crossed the road.

[31] Now, the first time that the defendant alleged that the plaintiff was collided into while crossing the road by a third party was when the defendant gave his evidence before the Sessions Court. This was definitely a clear and wilful departure from his pleaded case.

[32] The learned counsel for the defendant has put the defendant's version to the plaintiff in this way. That a motorcar no: ACN 3772 driven by the third party had collided into the plaintiff who was stationary at the centre of the road. But when the defendant gave evidence, he said something else. The

defendant said that the plaintiff was collided into by motorcar no: ACN 3772 driven by the third party when the plaintiff was crossing the road. At this juncture, one may pose these two pertinent questions:

(i) was the plaintiff stationary?; and

(ii) was the plaintiff crossing the road?

[33] With respect, the High Court failed to appreciate that the defendant did not even know what his case was all about. Pure and simple, it was a case of the learned counsel for the defendant putting one version and the defendant giving another version. The crux of the case was this: was the plaintiff crossing the road when he was collided into?, or was the plaintiff stationary at the centre white line?, or was the plaintiff walking along the right side of the road and that would be at Jalan Kamaruddin Isa facing the hospital as shown in the sketch plan at p. 31 of "AAR"?

[34] Looking at the pleadings in its correct perspective, one can safely say that the defendant has acknowledged that the plaintiff was walking along the side of the road. The defendant cannot now conveniently depart from his pleadings and attempt to make out a case different from what has been pleaded.

[35] The law books are replete with authorities on pleadings. They all say that pleadings are (i) concise statements of fact; (ii) and that only material facts and not law or evidence has to be pleaded (*Knowles v. Roberts* [1888] 38 Ch D 263, CA). The pleadings must be drafted in chronological order. It must be brief and succinct. It must not contain any verbiage. Only those facts which are necessary for the purpose of formulating a complete cause of action or defence need be set out (*Bruce v. Odhams Press, Limited* [1936] 1 KB 697, CA).

[36] According to Bret LJ in *Philipps v. Philipps And Others* [1878-79] 4 QBD 127, at 133, CA, "If parties were held strictly to their pleadings under the present system they ought not to be allowed to prove at the trial, as a fact on which they would have to rely in order to support their case, any fact which is not stated in the pleadings." It simply means that each party must plead all the material facts on which he proposes to rely at the trial; otherwise that party is not entitled to give any evidence of those material facts.

[37] According to the case of *Waghorn v. George Wimpey & Co. Ltd.* [1969] 1 WLR 1764 where the evidence adduced at the trial establishes facts which are different from those pleaded by the plaintiff as constituting negligence – in fact a radical departure, the action will be dismissed forthwith. Even if the plaintiff were to succeed at the trial based on findings of fact by the trial court, that judgment will not be allowed to stand and the appellate court will dismiss the action (*Rawding v. London Brick Co. Ltd.* [1971] 10 KIR 207, CA) or at the most will order a new trial (*Lloyde v. West Midlands Gas Board* [1971] 1 WLR 749, CA, [1971] 2 All ER 1240, CA).

[38] In an action for personal injuries against the defendant, the defendant must plead the defence before he is allowed to rely on it (*Davie v. New Merton Board Mills Ltd.* [1956] 1 WLR 233, [1956] 1 All ER 379).

[39] And it is not necessary for the defendant to defend himself against charges which are not yet made or to plead to causes of action which do not appear in the statement of claim (*Rassam v. Budge* [1893] 1 QB 571).

[40] Reverting back to the appeal at hand, the High Court saw it fit to absolve the defendant from all blame. According to the defendant, he saw the plaintiff crossing the road from his right to the left and at that time when the defendant saw the plaintiff, the plaintiff was at point "O" marked in the sketch plan at p. 31 of "AAR" and at that time the defendant was about 20 feet to 30 feet away from the plaintiff. Thus, the defendant was fully aware that the third party vehicle was coming from the opposite direction and if the defendant's version was true, this meant that a dangerous situation was building up ahead of him and yet he admitted that he still proceeded on. It can be surmised that the defendant ignored the dangerous situation that was building up ahead of him. I say that in such a situation, the defendant was duty bound to be cautious and must stop forthwith and not proceed further. Rule 25 of the Highway Code stipulates that a driver must stop, if by doing so he can avoid an accident or even the risk of an accident.

[41] In *M.A. Clyde v. Wong Ah Mei & Anor.* [1970] 1 LNS 73, the Federal Court held that a breach of r. 28 of the Highway Code can be used to invoke s. 59(4) of the Road Traffic Ordinance 1958 thereby raising a *prima facie* case of negligence.

[42] Abdoolcader J in *Yahaya bin Mat & Anor. v. Abdul Rahman bin Abu* [1982] CLJ 68; [1982] CLJ (Rep) 363 speaking for the Federal Court aptly said that he regretted that the trial judge did not use the breach of the provisions of rr. 56, 59 and 60 of the Highway Code for the purpose of establishing liability under the provisions of s. 59(4) of the Road Traffic Ordinance 1958.

[43] In my judgment, the High Court judge failed to consider the provisions of the Highway Code and had he done so he would not have interfered with the decision of the Sessions Court.

[44] It is now opportune for me to refer to the case of *Nance v. British Columbia Electric Railway Company LD.* [1951] AC 601, a decision of the Privy Council with a coram of Viscount Simon, Lord Porter, Lord Morton of Henryton, Lord Reid and Lord Asquith of Bishopstone. That was a case where the trial was before a special jury of an action for damages brought by the appellant against the respondent company in respect of the death of her husband, who was run into by a street-car and killed instantly, the trial judge directed the jury that before they could find that the deceased had been guilty of contributory negligence, as was alleged, they must find that he owed a duty to the respondent, and that he committed a breach of that duty and was therefore negligent. The jury negatived contributory negligence and found the respondent company solely to blame. The Privy Council held that the misdirection to the jury could not be regarded as vitiating the conclusion of the jury and that their verdict that the respondent was alone to blame should stand. Viscount Simon writing for the Privy Council aptly said at p. 611 of the report:

> With this conflict of judicial opinion before them their Lordships must now deal with the objection to the summing-up and consider whether the conclusion reached by the jury was affected by any mistake in it. The statement that, when negligence is alleged as the basis of an actionable wrong, a necessary ingredient in the conception is the existence of a duty owed by the defendant to the plaintiff to take due care, is of course, indubitably correct. But when contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the

party sued, and all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full. This view of the matter has recently been expounded, after full analysis of the legal concepts involved and careful examination of the authorities, by the English Court of Appeal in *Davies v. Swan Motor Co. (Swansea) Ld.* [1949] 2 KB 291, to which the Chief Justice referred.

[45] Continuing at the same page and spilling over to p. 612 of the report, Viscount Simon had this to say:

This, however, is not to say that in all cases the plaintiff who is guilty of contributory negligence owes to the defendant no duty to act carefully. Indeed, it would appear to their Lordships that in running-down accidents like the present such a duty exists. The proposition can be put even more broadly. Generally speaking, when two parties are so moving in relation to one another as to involve risk of collision, each owes to the other a duty to move with due care, and this is true whether they are both in control of vehicles, or both proceeding on foot, or whether one is on foot and the other controlling a moving vehicle. If it were not so, the individual on foot could never be sued by the owner of the vehicle for damage caused by his want of care in crossing the road, for he would owe to the plaintiff no duty to take care. Yet such instances may easily occur, eg, if the individual's rashness causes the vehicle to pull up so suddenly as to damage its mechanism, or as to result in following traffic running into it from behind or, indeed, in physical damage to the vehicle itself by contact with the individual. When a man steps from the kerb into the roadway, he owes a duty to traffic which is approaching him with risk of collision to exercise due care, and if a sentence of Denning, LJ's judgment in the *Davies* case [1949] 2 KB 291, 324, where he says, 'when a man steps into the road he owes a duty to himself to take care for his own safety, but he does not owe any duty to a motorist who is going at an excessive speed to avoid being run down', is to be interpreted in a contrary sense, their Lordships cannot agree with it.

[46] Next, it would be the case of *Caswell v. Powell Duffryn Associated Collieries, Limited* [1940] AC 152, a decision of the House of Lords. This was an action for damages instituted by the mother on behalf of her son, a mine worker, who met his death while at work in a colliery belonging to the respondents. Her case was that her son's death was due to the respondents' breach of their duty, under s. 55 of the Coal Mines Act 1911 to keep securely fenced the exposed and dangerous machinery in the mine which the deceased was employed to tend. Writing a separate judgment, Lord Porter had this to say of the words "contributory negligence" as seen at pp. 185 to 186 of the report:

> Strictly speaking the phrase 'contributory negligence' is not a very happy method of expressing an act of the employee which may relieve the employer from liability. Probably the phrase 'negligence materially contributing to the injury' would be more accurate, but if the word 'contributory' be regarded as expressing something which is a direct cause of the accident, either phrase is accurate enough and the less accurate phrase is, I think, sanctioned by long usage.

[47] If you are careless and by virtue of your carelessness you cause damage to others, you may be held liable to pay compensation. It is correct to say that the tort of negligence requires some form of careless conduct. But not all careless conduct which causes damage will give rise to an action in tort. According to Lord Wright in *Lochgelly Iron And Coal Company, Limited v. M'Mullan* [1934] AC 1 at 25, that the tort of negligence consists of a legal duty to take care and there is a breach of that duty by the defendant causing damage to the claimant.

[48] Put differently, the tort of negligence involves a duty of care, a breach of that duty and damage caused to the claimant by that breach. A motorist may drive his car as carelessly as he pleases and he will not be liable in tort unless he damages another. However, it is indisputable that all motorists "owe" a duty of care to other road users. The same duty of care would also apply to the defendant here when he drove that motor van WR 5906 along Jalan Kamaruddin Isa in the direction of Jalan Ghazali Jawi as depicted in the sketch plan at p. 31 of "AAR". The defendant "owe" that duty of care to the plaintiff so as not to collide into the plaintiff who was then walking on the right side of the same road facing the hospital. Lord MacMillan observed in *M'Alister (Or Donoghue) (Pauper) v. Stevenson* [1932] AC 562, HL, 619 that:

> The grounds of action may be as various and manifold as human errancy; and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed.

[49] Even though the facts in *M'Alister (Or Donoghue) (Pauper) v. Stevenson (supra)* concerned the manufacturer-consumer relationship and, factually speaking, are poles apart from the facts of the present appeal, yet the principles of law laid down in that case are of universal application. That case is regarded as a landmark in the tort of negligence.

[50] Negligence is the failure to exercise care which the circumstances demand (*Glasgow Corporation v. Muir And Others* [1943] AC 448 at 457, HL (Sc.), [1943] 2 All ER 44 at 48 HL; and *Carmarthenshire County Council v. Lewis* [1955] AC 549, HL (E) [1955] 1 All ER 565, HL) and what amounts to negligence would depend on the facts of each particular case. Lord Dunedin aptly said in *Fardon v. Harcourt-Rivington* [1932] All ER Rep 81 at 83, HL:

> The root of this liability is negligence, and what is negligence depends on the facts with which you have to deal. If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions.

[51] And where there is no duty to exercise care, negligence will have no legal consequence (*Le Lievre And Dennes v. Gould.* [1893] 1 QB 491 at 497, CA; *Bottomley And Another v. Bannister And Another* [1932] 1 KB 458 at 476, CA; and *Grant v. Australian Knitting Mills Limited, And Others* [1936] AC 85 at 103, PC). But where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which can reasonably be foreseen to cause physical injury to persons or property. In the words of Lord Macmillan in *Glasgow Corporation v. Muir And Others (supra)*:

> The standard of foresight of the reasonable man is, in one sense, an impersonal test. It eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question. Some persons are by nature unduly timorous and imagine every path beset with lions. Others, of

more robust temperament, fail to foresee or nonchalantly disregard even the most obvious dangers. The reasonable man is presumed to be free both from over-apprehension and from over-confidence, but there is a sense in which the standard of care of the reasonable man involves in its application a subjective element.

[52] And Lord Reid said in *AC Billings & Sons Ltd. v. Riden* [1958] AC 240 at 255, [1957] 3 All ER 1 at 8, HL that:

A 'reasonable man' does not mean a paragon of circumspection.

[53] On contributory negligence, I have this to say. For the defendant to establish contributory negligence on the part of the plaintiff, the defendant has to prove that the plaintiff's negligence was the cause of the harm. According to Viscount Simon in *Boy Andrew (Owners) v. St. Rognvald (Owners)* [1948] AC 140 at 149, HL (Sc.), [1947] 2 All ER 350 at 351, 354, HL, the question to ask would not be related as to who had the last opportunity of avoiding the mischief but rather whose act was instrumental in causing the harm. Sometimes a person may be found guilty of contributory negligence by his own act or omission just like, for instance, the failure of the motor cylist to wear crash helmet (*O'Connell v. Jackson* [1972] 1 QB 270, CA, [1971] 3 All ER 129, CA) or the failure to use the safety belt (*Froom And Others v. Butcher* [1976] 1 QB 286, CA, [1975] 3 All ER 520, CA).

[54] What is required of the defendant in order to establish a plea of contributory negligence is rather easy. It is for the defendant to prove that the plaintiff did not in his own interest take reasonable care of himself and thus contributed by his own want of care to his own injury (*Nance v. British Columbia Electric Railway Company LD. (supra)*).

[55] The plaintiff as a pedestrian has the right to be on the highway and he is entitled to expect that the defendant as the driver of the motor van WR 5906 to exercise reasonable care while driving along Jalan Kamaruddin Isa towards the direction of Jalan Ghazali Jawi (*Craig v. Glasgow Corporation* [1919] 35 The Times Law Reports 214, HL; and *Boss v. Litton* [1832] English Reports 172, 5 CAR & P 407). But the plaintiff too must take reasonable care of himself while walking on the same road facing the hospital (*Kayser v. London Passenger Transport Board* [1950] 1 All ER 231; and *Gaffney v. The Dublin United Tramways Co., Ltd.*

A [1916] Vol. II Irish Reports 472) otherwise he too would be found to have contributed to his own injury on the basis of 50% liability and, in fact, this was what the Sessions Court found him to be. We would agree with the finding of the Sessions Court that the plaintiff had contributed 50% to his own injury.

B

[56] It must be recalled that when the motor van WR 5906 suddenly collided into the plaintiff, the latter lost consciousness. That explains the reliance by the plaintiff in his statement of claim on the doctrine of *res ipsa loquitur*, namely, the facts speak for C themselves.

[57] Now, under this doctrine of *res ipsa loquitur*, what the plaintiff has to do is to establish a *prima facie* case of negligence when (i) he is not in a position to prove precisely as to how the accident had occurred; and (ii) that it is more likely than not that D it was the defendant that had caused the accident due to his act or omission to take proper care for the sake of the plaintiff's safety (*Lloyde v. West Midlands Gas Board (supra); and Turner v. Mansfield Corpn* [1975] Vol. 119 Part 2 Sol Jo 629, CA).

E **[58]** Here, as far as the plaintiff was concerned he did not know how the accident had happened. He only regained consciousness in the hospital. But the inference of negligence on the part of the defendant was clear. By looking at the extensive damage to the defendant's motor van WR 5906, one can reasonably conclude F that the defendant had driven at a fast speed and it had caused the plaintiff to sustain serious injuries which led to his paralysis when the said motor van collided into the plaintiff. The impact of the collision caused the plaintiff to be flung upwards and landed onto the front windscreen of the motor van WR 5906. The impact G also caused the front windscreen of the said motor van to shatter into pieces. Glass fragments of the front windscreen of the said motor van fell onto the road near to the centre white line as seen in the sketch plan.

H **[59]** If the cause or causes of the accident are known, the case would not fall under the category of the doctrine of *res ipsa loquitur* – where the facts would speak for themselves. In *Gee v. The Metropolitan Railway Company* [1872-3] LR Vol. VIII QB 161, for instance, the cause of the accident was known when a few

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minutes after the train started the door flew open and the plaintiff fell out and the court held that there was evidence of negligence by the railway company.

[60] In *McGowan v. Stott* [1930] Vol. 99 Law Journal Reports, King's Bench 357, CA, the doctrine of *res ipsa loquitur* was held applicable to highway accidents where the defendant there was in charge of the vehicle that caused the damage.

[61] For the maxim *res ipsa loquitur* to apply, the defendant must be in control of the thing that caused the accident (*Turner v. Mansfield Corpn (supra)*). Thus, if a surgeon is shown to be in general command of an operation and the patient cannot prove that it was the malpractice of the surgeon or one of the supporting staff which inflicted damage on him in the course of that operation, then the maxim *res ipsa loquitur* would apply in an action for negligence by the patient against the surgeon (*Mahon v. Osborne* [1939] 2 KB 14, CA, [1939] 1 All ER 535, CA).

[62] Another interesting case would be the case of *Widdowson v. Newgate Meat Corporation and Others* [1997] Times LR 622. In that case, neither party gave evidence. The plaintiff did not give evidence because he suffered from a serious mental disorder and he was found lying in the middle of the nearside lane of a dual carriageway. The defendant, on the other hand, did not give evidence because he thought that he had no case to answer, and he had told the police that he had been travelling at about 60 m.p.h. with the headlights on high beam and suddenly he collided into something. He also told the police that he did not know what he had collided into and that he had seen nothing. The trial judge refused to apply the maxim of *res ipsa loquitur* and forthwith dismissed the plaintiff's claim. On appeal, the Court of Appeal held that the trial judge was wrong. The Court of Appeal also held that although the maxim rarely applied in traffic cases, it was also not usual for there to be no evidence from either party. It was argued that the plaintiff could have asserted that it was more likely than not that the effective cause of the accident was the failure of the driver, after a long day, to observe and avoid the plaintiff, and no plausible explanation had been offered to rebut this inference. The Court of Appeal then assessed contributory negligence at 50 per cent and by doing so it split the liability equally.

[63] Equal apportionment was also ordered in *Jenkins v. Holt* [1999] Times LR 416, CA. In that case, the facts showed a collision between two motor cars. The defendant there drove the motor van into the plaintiff who was, at that time, executing a U-turn on a wide straight road. Both the parties denied having seen the other on the road.

[64] The Privy Council in *Overseas Tankship (U.K.) Ltd. v. Morts Docks & Engineering Co. Ltd. (The Wagon Mound)* [1961] AC 388 (known generally as "Wagon Mound (No: 1)"), rejected the test of remoteness in the tort of negligence propounded by the Court of Appeal in *In re An Arbitration Between Polemis And Another And Furness, Withy And Company, Limited* [1921] 3 KB 560, CA, (hereinafter referred to as "Re Polemis") to the effect that the negligent defendant should be liable for all the direct consequences attributable to his negligence.

[65] According to the Privy Council in *The Wagon Mound (No: 1) (supra)* the proper test to apply for remoteness of negligence would be that the defendant is only liable for damage of a kind which a reasonable man should have foreseen.

[66] The injuries sustained by the plaintiff should have been foreseen by the defendant when the defendant drove the motor van WR 5906 at a fast speed and collided into the plaintiff who was walking by the side of the road. Any reasonable man similarly placed in the situation in which the defendant was placed when driving the motor van WR 5906 should have foreseen that an accident would occur and that the plaintiff would sustain those injuries.

[67] According to the Privy Council in *The Wagon Mound (No: 1) (supra)* at pp. 425 to 426 that "the essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen." It is this test that I have applied to determine the liability of the defendant in this appeal.

[68] The defendant emphasised that the plaintiff had in his police report said that he was walking on the left side of the road when he was collided into. Whereas the plaintiff had in his evidence said that he was not walking on the left side of the road as one faces the hospital but if from the hospital he was walking on the left side of the road.

[69] It must be recalled that the plaintiff suffered devastating injuries. He became paralysed from the waist downwards. That must have been too much for him to bear. His whole world must have fallen into pieces. In that frame of mind, the plaintiff lodged his police report at about 11.40pm on the night of 10 July 1996 and on the next day – on 11 July 1996, he left for Indonesia.

[70] It makes no difference whether the plaintiff, if indeed it was true, had crossed the road from left to right or from right to left because the defendant had put his case to the plaintiff that the plaintiff was stationary at the centre white line when the plaintiff was purportedly collided into by the third party motor car.

[71] But the defendant, in his statement of claim against the third party, pleaded that the plaintiff was walking by the side of the road when the third party vehicle collided into him.

[72] And when the defendant gave evidence he surprisingly went against what he had pleaded and what his counsel had put to the plaintiff about the plaintiff crossing from the defendant's right to the defendant's left and that the plaintiff was at point "O" marked on the sketch plan when the plaintiff was collided into. What all these amounted to was this. That the plaintiff was crossing the road, which was in the defendant's police report and neither was it pleaded by the defendant nor was this put to the plaintiff under cross-examination.

[73] Had the High Court judge asked the correct question and viewed the evidence in its totality instead of compartmentalising them, he would, with respect, have apportioned liability in equal proportion between the plaintiff and the defendant like what the Sessions Court did.

[74] The correct approach to appraise the evidence in an appeal of this nature has been laid down by this court in *Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545. There at pp. 549 to 550, this court had this to say:

> We are fully conscious that this is an appeal that turns upon a question of fact. However, a careful reading of the trial judge's judgment shows that the process of reasoning adopted by him for preferring the evidence of the defence witnesses is based upon a wrong premise and does not accord with a well-settled principle that goes to form the fulcrum upon which the scales of procedural justice turn.

A First, the trial judge appears to have completely overlooked the inherent probabilities of the case. Evidence was led to prove that the plaintiff was a person who had a history of following orders given to him by those who held him in their custody, including the first respondent. Indeed the plaintiff testified, without challenge, of the dire consequences that would ensue from disobedience. All this evidence was entirely accepted by the defendants. Yet, the defendants' case was that on this occasion the plaintiff had wilfully disobeyed an express order given to him. The question which the trial judge ought to have asked himself is whether it was inherently probable that the plaintiff, on this isolated instance, would have dared disobey an express order given to him not to climb the tree. Had he done so, he would, upon a proper assessment of the totality of the evidence, have come to the conclusion that the defence story was wholly improbable.

So, here we have a case where there was insufficient judicial appreciation by the trial judge of the evidence of circumstances placed before him. And of the principles that should govern such a case as the present there is no doubt.

It is trite law that this court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary task of evaluation of the evidence. But we are under a duty to intervene in a case where, as here, the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.

[75] Gopal Sri Ram JCA speaking for this court in *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19 spoke of the need to assess the evidence and to weigh them and for good reasons accept or reject them accordingly. This was what his Lordship said at p. 33 of the report:

Suffice to say that we re-affirm the proposition that an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence. It is, we think appropriate that we say what judicial appreciation of evidence involves.

A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness, test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach to judicial appreciation of evidence is the same.

[76] It cannot be denied that the police report of the defendant was directed entirely on the third party and not at the plaintiff. The Sessions Court judge and the High Court judge have absolved the third party from blame because, on the evidence, the third party did not collide into the plaintiff. That was the end of the matter as far as the third party was concerned.

[77] Simply put, the plaintiff's case has always been that the third party did not collide into him. The plaintiff did not mention any third party in his police report nor did the plaintiff make the third party as a defendant and the plaintiff too did not shift any blame to the third party. With respect to the High Court judge, the plaintiff has not erred in not bringing the third party as a defendant and the plaintiff was proved right when the Sessions Court dismissed the defendant's case against the third party.

[78] You cannot read the evidence of the plaintiff out of context when the plaintiff said that he did not know how the accident had occurred. What he meant by it was that he did not know how the accident had happened in that he did not know why the motor van WR 5906 came and collided into him. However, the plaintiff's evidence that he was walking by the side of the road was admitted by the defendant in the defendant's statement of claim against the third party.

[79] I shall now turn to the role of the third party. There was no evidence to link the third party to the collision between the defendant's motor van WR 5906 and the plaintiff. Indeed the plaintiff has been very emphatic that apart from the defendant's motor van, the plaintiff was not collided into by any other vehicle.

[80] The third party did not give evidence and he elected to submit that there was no case to answer. The third party was certainly entitled to make an election (*Laurie v. Raglan Building Co., Ltd* [1941] 3 All ER 332, CA; *Parry v. Aluminium Corporation, Ltd.* [1940] Vol. 162-3 The Law Times 236, CA; *Simirah v. Chua Hock Lee & Anor.* [1963] 1 LNS 128; and *Goh Ya Tian v. Tan Song Gou & Ors*. [1981] 1 LNS 39).

[81] The third party relied on the plaintiff's evidence and the evidence of the investigating officer in order to exculpate himself from liability.

[82] It is part and parcel of my judgment that the third party is not liable, on the evidence, in this accident for the following salient reasons:

(i) that the plaintiff has stated that apart from the defendant's motor van WR 5906, no other vehicle collided into him;

(ii) that if the defendant's version is true that the third party collided into the plaintiff on the third party's side of the road there would be some glass fragments or other debris on the third party's side of the road but there was none;

(iii) the investigating officer has categorically stated that there was no collision between the third party vehicle and the plaintiff;

(iv) that the third party was charged under r. 10 of the Road Traffic Rules for colliding into a row of parked vehicles and not into the plaintiff;

(v) it would have simply be impossible for the plaintiff to have been thrown from point "O" as depicted on the sketch plan to the defendant's side of the road;

(vi) if the defendant was travelling at 45 k.m.p.h and was 20 feet to 30 feet away from the plaintiff, the defendant would have passed the plaintiff even before the plaintiff could come to the centre white line and if that were to happen there would not have been any accident between the plaintiff and the defendant; and

(vii) from the sketch plan there is nothing to show that the collision occurred on the third party's side of the road.

[83] It is apparent, from the evidence, that the defendant gave three versions namely:

(i) that the plaintiff was walking along the side of the road when the plaintiff was collided into by the third party motor car ACN 3772;

(ii) that the third party motor car ACN 3772 collided into the plaintiff when the plaintiff was stationary in the centre of the road; and

(iii) that the third party motor car ACN 3772 collided into the plaintiff when the plaintiff was crossing the road.

[84] Because of these three different versions, we were urged to reject the defendant's case in toto and to allow the plaintiff's claim in full because the defendant has supported the plaintiff's case that the plaintiff was walking along the side of the road.

[85] While acknowledging that the High Court judge had failed to consider the three versions advanced by the defendant, we were not inclined for the reasons adumbrated in the early part of this judgment to interfere with the findings of liability of equal proportion between the plaintiff and the defendant by the Sessions Court judge. The defendant was negligent in driving the motor van WR 5906 in the manner in which he did and the plaintiff too contributed by his own want of care for the injuries sustained by him.

(b) Loss Of Future Earnings At RM153,600

[86] The defendant contended, under this head, that they were illegal earnings. The Sessions Court judge made such an award but the High Court judge set it aside. Before us, the plaintiff argued that this award should be re-instated based on the facts of the case.

[87] For this exercise, it would be ideal to look at the available evidence. Before the Sessions Court judge the plaintiff testified that "semasa kemalangan saya ada permit yang sah bekerja di Malaysia" and that after the accident he went back to Indonesia on 11 July 1996.

[88] It must be recalled that the plaintiff was paralysed waist down and he could not have gone back to Indonesia without the authorities knowing of his departure. The plaintiff must have produced his passport at the departure counter and the immigration officer must also have seen that the plaintiff's work permit was valid until 21 June 1997. It follows therefore that as at July 1996 when the plaintiff left Malaysia he was a legal immigrant worker. And if there was anything wrong with the plaintiff's work permit, he would surely have been detained by the immigration. But this was not to be.

[89] Seen in this light, the argument that at the date of the accident namely, 30 June 1996, that the plaintiff was working illegally was not true. The plaintiff had a valid work permit in the eyes of the law and what was outside the work permit was that he did not work with Faisal Enterprise but instead with Lee Kam Seng Construction. The pertinent question to pose would be this: if the permit was meant to work with Faisal Enterprise, can the plaintiff's working with Lee Kam Seng Construction be legitimised by merely applying for a change of employer? The answer would be in the positive. On application, a change of employer will be entertained by the immigration department. The fact that the plaintiff was temporarily working with Lee Kam Seng Construction cannot be construed that the plaintiff was working illegally in Malaysia bearing in mind that the plaintiff's employment with Lee Kam Seng Construction can be legitimised.

[90] While sitting on the High Court bench, I had occasion to consider as to whether illegal earnings can be legitimised in the case of *Wakil Diri Bagi Harta Pusaka Atas Rosli Md Nor (Simati) & Ors v. TP Saffeer & Anor* [1998] 4 CLJ 241. At pp. 251 to 252, this was what I said:

> But the illegality of the deceased's employment could have been legitimised. At this stage, a repetition of the facts is necessary. The deceased held a red identity card and according to SP1 the deceased was a permanent resident. At the time of the accident, the deceased's father was in Malaysia. SP1 promised to obtain the

work permit for the deceased within a period of three months from the date of recruitment. There was no evidence to show that the deceased was unlikely to obtain a work permit. The same scenario appeared in *Nazori bin Teh & Anor v. Tay Lye Seng & Anor* [1996] 1 AMR 706 where the defendant failed to show that the first plaintiff was unlikely to get a work permit. It was for this reason that the learned Judge was of the view that the illegality was capable of being legitimised. At pp 711-712 of the judgment, the learned Judge in *Nazori bin Teh & Anor v. Tay Lye Seng & Anor (supra)* had this to say and which I respectfully adopt:

> At page 30 of the judgment, the learned Judge citing *Ooi Han Sun & Anor v. Bee Hua May* [1991] 3 MLJ 219, another Singapore High Court case where no work permit was issued, succinctly summarised the principles in *Ooi Han Sun*'s case as follows:
>
> (i) that the maxim *ex turpi causa non oritur actio* (no cause of action arises out of a base cause) will apply in law of contract to prevent a plaintiff founding a claim on an illegal act or agreement;
>
> (ii) that the maxim has a limited application in tort and the fact that the plaintiff is involved in some wrongdoing does not of itself provide the defendant with a good defence in tort;
>
> (iii) the effect of illegality on quantum of damages is not to make compensation hopeless;
>
> (iv) that notwithstanding illegality, damages would be awarded but there would be a discount for the *ex turpi causa*;
>
> (v) that consideration should be given to cases where illegality was capable of being legitimised; and
>
> (vi) that the burden of proof of illegality was capable of being legitimised was on the plaintiff.

In my judgment, the earnings of the deceased can, in law, be legitimised and that being the case, the earnings derived as a cook from Zam Zam restaurant was not illegal. Those earnings can be computed for purposes of loss of earnings sustained by the widow and her son. This was my judgment and I so hold accordingly.

[91] It is germane to refer to the evidence of the plaintiff's employer, at this juncture. This was what the plaintiff's employer said in his evidence at p. 289 of "ARB3":

> Semasa saya ambil Sukatno bekerja saya tahu beliau dari negara asing. Saya tidak dapat kelulusan dari pejabat Imigresen tetapi Sukatno ada permitnya sendiri.

[92] Here, we have the plaintiff's employer admitting that he did not get the consent of the immigration for the plaintiff to change his employer. The burden would be on the employer to obtain the change of the employer's permit. No such burden can be imposed on the plaintiff.

[93] The duty has all along been on the employer who wants to take on a foreign worker to ensure that he prepares the proper documents and submits them to the immigration department and if the employer does not do that, the fault cannot be shifted to an employee like the plaintiff here.

[94] There was no reason for the plaintiff to doubt that his work permit was valid. The plaintiff arrived in Malaysia through the proper channels. No evidence was introduced that the plaintiff had entered Malaysia illegally. It must be recalled that when the plaintiff returned to Indonesia from Malaysia on 11 July 1996, the Malaysian immigration department would have detected that the plaintiff's passport did not have an arrival "chop". The plaintiff's arrival and departure were proper and the plaintiff had no problem with the immigration department.

[95] It must be emphasised that when the plaintiff lodged his police report pertaining to the accident on 10 July 1996, the police even recorded the plaintiff's passport number as F 378188 on the police report itself. It must be presumed that the police must have meticulously checked the plaintiff's passport bearing in mind that the plaintiff was a foreignor and nothing amiss was found.

[96] Taking the evidence in its correct perspective, there is no concrete proof that the plaintiff is an illegal worker. Neither is there any evidence that the plaintiff played a role in contravening the law of this country. The High Court judge failed to assess the evidence judiciously and he arrived at the wrong conclusion when he set aside the award under this head.

[97] It is now appropriate to reproduce the speech of Siti Norma Yaakob JCA (as she then was) in the case of *Tay Lye Seng & Anor v. Nazori bin Teh & Anor* [1998] 3 CLJ 466 CA. At pp. 472 to 473, this was what her Ladyship said: A

> The Supreme Court's decision in *Chua*'s case, and its approval of the decisions reached by the other common law jurisdictions in *Ooi Han Sun, Burns, LeBagge and Dhlamini* left us with the conclusion that whilst public policy would defeat any claim based on illegality, a balance has to be drawn based on the peculiar facts and circumstances of each case. In all the cases cited above, there is the element of culpability on the part of the plaintiff who claims for loss of earnings or support for the wrongdoing complained of or that the claim flowed directly from the wrongdoing. Where he is without fault, he may – it seems – recover according to the usual principles of measure of damages. Thus in *Chua*'s case, the deceased never applied for a taxi licence when he was operating his taxi but instead assumed the one that was issued to his father but the licence was never transferred into his name during his lifetime. The deceased had committed an offence under s. 126 of the then Road Traffic Ordinance 1958 and he could have been prosecuted and for this very reason the estate of the deceased could not benefit from his earnings of the use of the unlicensed taxi. B C D E

[98] Yong Pung How CJ Singapore, sitting on the High Court bench in the case of *Ooi Han Sun & Anor v. Bee Hua Meng* [1991] 3 MLJ 219 was confronted with the plaintiff working illegally in Singapore and according to his Lordship public policy will not allow the plaintiff to be compensated for loss of earnings based on wages arising from working illegally in Singapore and that the loss of earnings to be based on earnings in Malaysia. At pp. 223 to 224, this was what his Lordship said: F G

> While, therefore, the first plaintiff would not be precluded from claiming against the defendant in this case in spite of his being on his way to work without having a work permit at the time of the accident, the question has to be considered again from the point of view of the quantum of damages to which he is entitled, and in particular, whether and to what extent his illegal earnings in Singapore at the time of the accident might be used as a basis for calculating his pre-trial loss of earnings and his future loss of earnings. As to the effect of illegality on the quantum of damages to be awarded, the case law in Singapore and Malaysia is scanty and not entirely clear. In *Kang Bark Teng & Anor v. Lee Kwee Lim* H I

& Anor [1952] MLJ 27, an unlicensed pork seller was killed in a motor accident. Rogers J in the Singapore High Court, apparently without the benefit of argument or case law on the point, found the deceased's position to be one of uncertainty, but, as the deceased had been earning $300 per month for some time, he ignored the illegality and fixed the damages for the dependents on that basis. In *Tan Chooi Thin & Anor v. Teo Whee Hong* [1953] MLJ 203, the deceased was a member of the crew of a motor junk and was alleged to be deriving some extra-curricular income from the illegal business of trading in precious stones in violation of customs legislation. Although there was no evidence, Buhagiar J in the Penang High Court observed obiter that, even if there was reliable evidence as to its nature, he did not think that the profits made from that business could be excluded in reckoning the deceased's earnings. In *Yaakub Foong v. Lai Mun Keong & Ors* [1986] 1 CLJ 355; [1986] CLJ (Rep) 790, the plaintiff who was a Malaysian citizen was run down in Johore Bahru. Liability was admitted and the only dispute was on the quantum of the plaintiff's earnings. The plaintiff claimed that he worked in Singapore, and admitted that he did not pay any income tax and even performed additional work in contravention of his work permit. Shankar J was of the view that, if there had been cogent evidence as to the precise amount of the tax payable by the plaintiff and of the amount which he had illegally earned in contravention of his work permit, he would have discounted the damages arithmetically due to the plaintiff on both counts.

[99] Again, at pp. 224 to 225, his Lordship continued to say:

In my judgment, the assessment of the first plaintiff's loss of earnings should be based on an estimate, however difficult and imprecise this might be, of what he would have earned in Malaysia had there been no accident to him. The immigration laws and regulations which require work permits to be obtained by foreign workers before they can work in Singapore were not designed merely to raise a little extra revenue, but to implement a basic public policy. To compensate the first plaintiff on the basis of what he might have earned by working illegally in Singapore without a valid work permit would be against public policy and wholly improper. Apart from the first plaintiff's statement in his evidence that he expected Ching to get a work permit for him soon, there was no evidence whatsoever that an application for a work permit had been or would be made, or, indeed, that an application would necessarily be successful, if made. An examination of his passport showed that, although he made numerous visits to Singapore from 1978 to 1983, he had only

been issued with a work permit for two successive three-month periods in 1980 and on all other occasions was in Singapore only on a social visit pass which prohibited employment. It would appear that he had no work permit even in his most recent job as a fitter and welder in another shipyard which he left for Ching only a few days before the accident.

In assessing what he would have earned in Malaysia had there been no accident to him, the court has to take a pragmatic approach to the problem. I have in this case discarded the pay and the other support given to him by his sister, as they appear to me to be in the nature of support by the family rather than wages in an arms-length employment which can serve as a reliable guide. Having regard to the unchallenged evidence that wages in Singapore were about 50% higher than those in Malaysia, the fact that he had little education, and the amount of wages paid by his sister to other workers in her shop, I have awarded him S$300 per month (as the Singapore dollar equivalent of the wages which he would have earned in Malaysia) for the whole of the period of about 94 months between the accident and judgment. Similarly, in calculating his future loss of earnings, I have taken the same figure of S$300 as the multiplicand and, having regard to his age, applied a multiplier of 15 years. I am aware that in such cases the court has a discretion to award the damages in a foreign currency if this is the currency which best expresses the plaintiff's loss: *Miliangos v. George Frank (Textiles) Ltd* [1976] AC 443; [1975] 3 All ER 801; *The Despina R* [1979] AC 685; [1979] 1 All ER 421; *Hoffman v. Sofaer* [1982] 1 WLR 1350. However, as the damages are being awarded for a tort committed in Singapore and the Malaysian currency has been used only as a means of calculation, I have refrained from departing from the usual practice of the court and have continued to express the damages awarded in Singapore dollars.

[100] Unfortunately, the plaintiff's loss of future earnings cannot be based on what the plaintiff would have earned in Indonesia because no evidence was led to assist the Sessions Court judge. Looking at the cold print, and based on the available evidence, this court would accordingly re-instate the award under this head which was allowed by the Sessions Court judge.

Conclusion

[101] For the reasons adumbrated above, we allowed the appeal of the plaintiff with costs here and below. We set aside that part of the decision of the High Court judge which dismissed the plaintiff's claim against the defendant. We also set aside the

A decision of the High Court judge in not awarding loss of future earnings at RM153,600. We affirmed the decision of the Sessions Court judge in regard to the findings of 50% liability against the defendant for negligence and 50% liability against the plaintiff for contributory negligence. We also affirmed the decision of the
B Sessions Court judge in regard to the quantum of damages awarded to the plaintiff.

[102] We also confirmed the dismissal of the defendant's claim against the third party with costs here and below.

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[103] We were told at the bar that the plaintiff had deposited the sum of RM7,000 as security for costs at the Ipoh Sessions Court and we accordingly made an order that that sum to be refunded to the plaintiff forthwith.

D **[104]** Finally, we made an order that the deposit of this appeal to be refunded to the plaintiff.

[105] On the authority of the Federal Court case of *Abdul Ghaffar Md Amin v. Ibrahim Yusoff & Anor* [2008] 5 CLJ 1, FC,
E this appeal ends here. It cannot proceed to the Federal Court.

[106] This is a unanimous decision. I have shown this judgment in draft to my learned brothers James Foong Cheng Yuen, JCA and Abu Samah bin Nordin, JCA and they have kindly agreed to
F make it the judgment of this court.

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